In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1023

ROBERT E. RATH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted after a jury trial of willfully attempting to evade federal income taxes, in violation of Section 7201 of the Internal Revenue Code of 1954. At his trial the prosecution introduced several hundred exhibits (Pet. 8) and numerous witnesses (Pet. 3) to prove the underlying facts, followed by a summary exhibit offered by an expert witness whose qualifications petitioner has conceded (Pet. 5, 8).

Petitioner contends that the summary and the expert's testimony invaded the province of the jury (Pet. 5). This was laid to rest in *United States* v. *Johnson,* 319 U.S. 503, 512–520; and the use of

335-448—69

expert testimony to evaluate the evidence in criminal (or other) tax cases has been standard practice ever since. In *Johnson*, it was observed that by "proper guidance" from the trial court the jury must be left free to "exercise its untrammeled judgment upon the worth and weight of testimony" (p. 519). Here, the court's instructions (Pet. 12–13) explicitly left the ultimate facts to the jury's determination,[1] and petitioner does not even attempt to show how the instructions were inadequate. He accepted them in the trial court and proposed no different instructions (R. 22b–27b, 32b–33b). Clearly there is no justification for granting certiorari in order to review the court of appeals' conclusion that (Pet. 8) "The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it."

Petitioner also asserts that he "was convicted by a mass of irrelevant testimony" (Pet. 6). Petitioner did not contend in the court of appeals that there was a lack of evidence to support his conviction or that evidence was admitted which should have been excluded. It is obviously too late to advance such a contention now.

---

[1] In addition, the prosecutor told the jury (R. 35b): "So Mr. Schiller [the expert witness] has assumed certain things from the evidence. If you don't reach the same finding, Ladies and Gentlemen, you can disregard item by item whichever you don't so find." "R." references are to the Appendix to the Government's brief in the court of appeals.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969